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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86757434
Applicant	Incline Health, Inc.
Applied for Mark	EVL
Correspondence Address	DARREN A. HEITNER Heitner Legal P L L C 1736 NE 7th St Fort Lauderdale, FL 33304-3469 UNITED STATES darren@heitnerlegal.com
Submission	Appeal Brief
Attachments	Ex Parte Appeal w Exhibits.pdf(2378723 bytes)
Filer's Name	Darren Heitner
Filer's e-mail	darren@heitnerlegal.com, alan@heitnerlegal.com
Signature	/Darren Heitner/
Date	09/15/2016

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 86757434

MARK: EVL

86757434

CORRESPONDENT ADDRESS:

DARREN A. HEITNER
HEITNER LEGAL, P.L.L.C.
1736 NE 7TH STREET
FORT LAUDERDALE, FL 33304

RETURN ADDRESS:

Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

APPLICANT: INCLINE HEALTH, INC.

CORRESPONDENT E-MAIL ADDRESS:

DARREN@HEITNERLEGAL.COM

**Examining Attorney's Name and
Law Office Number:**

Allison Holtz, Esq.
Examining Attorney
Law Office 111

CORRESPONDENT'S REFERENCE/DOCKET NO:
N/A

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EX PARTE APPEAL APPLICANT'S BRIEF

COMES NOW the Applicant, INCLINE HEALTH, INC. ("Applicant"), by and through undersigned counsel, and hereby respectfully appeals the Examining Attorney's refusal to register the mark EVL ("Mark").

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DESCRIPTION OF RECORD

A. PROSECUTION HISTORY

The application for EVL (“Application”) was initially refused on December 30, 2015 in a non-final Office Action (the “December 2015 Office Action”) based upon a likelihood of confusion with the mark in U.S. Registration No. 3904885. Within the December 2015 Office Action, the Examining Attorney also stated that there was a prior pending application – U.S. Application Serial No. 86524423 – that preceded Applicant’s filing date, and that if the foregoing mark received registration, Applicant’s Mark may be refused registration under Trademark Act Section 2(d) because of likelihood of confusion. Applicant filed a response to the December 2015 Office Action on April 18, 2016.

On May 6, 2016, the Examining Attorney issued a Suspension Notice (the “May 2016 Suspension Notice”) suspending action on the Application, because the effective filing date of the pending application for Serial No. 86524423 preceded the filing date of Applicant’s Application. Within the May 2016 Suspension Notice, the Examining Attorney also maintained refusal of registration of the Mark based upon a likelihood of confusion with the mark in U.S. Registration No. 3904885. Applicant filed a response to the May 2016 Suspension Notice on June 14, 2016.

On June 27, 2016, the Examining Attorney issued another Suspension Notice (the “June 2016 Suspension Notice”) upholding her previous suspension of the Application for the same reasons set forth in the May 2016 Suspension Notice. In the June 2016 Suspension Notice, the Examining Attorney also continued to maintain refusal of registration of the Mark based upon a likelihood of confusion with the mark in U.S. Registration No. 3904885. Applicant filed a response to the June 2016 Suspension Notice on June 30, 2016.

On August 5, 2016, the Examining Attorney issued a final office action (the “August 2016 Office Action”). Therein, the Examining Attorney stated that refusal of registration of the Mark was being made final under Trademark Act Section 2(d) based on a likelihood of confusion with U.S. Registration No. 3904885. Applicant’s Notice of Appeal was timely filed on September 2, 2016.

B. EXAMINING ATTORNEY’S EVIDENCE

The Examining Attorney appended five (5) attachments to the December 2015 Office Action. The attachments consist of information that relates to the marks mentioned in the December 2015 Office Action that the Examining Attorney stated served as bars to registration of the Mark – specifically, U.S. Registration No. 3904885 and Serial No. 86524423.

The Examining Attorney did not append any attachments to the May 2016 Suspension Notice or to the June 2016 Suspension Notice.

The Examining Attorney appended three (3) attachments to the August 2016 Office Action. The attachments are identical to those attachments appended to the December 2015 Office Action with regard to U.S. Registration No. 3904885. No attachments were appended for Serial No. 86524423, because its owner voluntarily abandoned the mark contained in the application for Serial No. 86524423, and, as a result, the mark no longer served as a bar to registration of the Application.

C. APPLICANT’S EVIDENCE

In Applicant’s response to the December 2015 Office Action, Applicant presented evidence in the form of background information regarding Applicant. Pursuant thereto, Applicant informed the Examining Attorney that Applicant was the company behind Evlution Nutrition a/k/a EVL Nutrition, a prominent and widely known nutritional supplement company

with distribution channels across the globe, including, without limitation, in popular stores such as GNC and online via its own website – <http://evlnutrition.com/> – and on www.bodybuilding.com, an online retailer specializing in dietary supplements, sports supplements, and bodybuilding supplements that is one of the Internet’s most trafficked health and fitness websites, hosting over 1 million visitors per day¹. Applicant also informed the Examining Attorney that it is the owner of a federally registered trademark for “EVL” (Registration No. 4423095) – a trademark identical to the Mark – for the following goods and services: “Dietary supplements and nutritional supplements, namely, dietary and nutritional supplements in the form of powdered drink mixes, tables, bars, powders, nutritional drinks, and liquid drink mixes.” Applicant provided this information to show that Applicant has become readily associated with term “EVL” as it relates to goods and services provided in the fitness, health, wellness, and athletic apparel industry due to the brand established through its ongoing and continuous use of the EVL moniker.

In its response to the December 2015 Office Action, Applicant also presented information regarding EVL Productions, Inc., the owner of U.S. Registration No. 3904885. Pursuant thereto, Applicant informed the Examining Attorney that EVL Productions, Inc. is a company best known for its development of the 3D graffiti style and use of colorful murals in forming creative production designs, an activity that provides goods and/or services completely unrelated to the goods and services promoted via Applicant’s EVL brand.

In Applicant’s response to the May 2016 Suspension Notice, in addition to the information already provided above, Applicant provided information stating that Applicant has received multiple accolades regarding products supplied and/or sold using the Mark, including,

¹ See <https://en.wikipedia.org/wiki/Bodybuilding.com>

² Link to the award attached to May 2016 Suspension Notice.

³ See <http://www.dictionary.com/browse/connotation?s=t>

⁴ For examples, see, e.g., <https://www.cellucor.com/apparel>, <https://teamgat.com/store#!/GAT-Gear/c/11558015>, <https://shredz.com/shop#accessories+bottoms+looks+stringers+t-shirts+tanktops+tops>, and

without limitation, being named 2015 Breakout Brand of the Year by www.bodybuilding.com². Applicant also informed the Examining Attorney that it has entered into and executed numerous endorsement deals with high profile professional athletes, and provided information regarding Applicant's substantive reach across social media, specifically, on websites such as Instagram, Twitter, and Facebook. Furthermore, Applicant informed the Examining Attorney that its date of first use in commerce with regard to the goods and services applied for under 1A in the Application (July 7, 2013) preceded the date of first use in commerce with regard to the goods and services applied for under 1A in the application for Serial No. 86524423 (August 29, 2014), and as a result, Applicant had established prior unregistered rights (i.e. common law trademark rights) in and to the Mark. Applicant also provided information – attached to Applicant's response as Exhibit A – from the attorney of the owner of Serial No. 86524423 that stated that the owner had elected to voluntarily abandon its application.

In Applicant's Response to the June 2016 Suspension Notice, Applicant presented evidence informing the Examining Attorney that the owner of Serial No. 86524423 had filed a Request for Express Abandonment on June 14, 2016, and that on June 15, 2016, the USPTO issued a Notice of Abandonment stating that the application for Serial No. 86524423 had been abandoned and was no longer active.

Other than the aforementioned, there was no other evidence attached or included in Applicant's response to the December 2015 Office Action, May 2016 Suspension Notice, or June 2016 Suspension Notice.

² Link to the award attached to May 2016 Suspension Notice.

ARGUMENT

I. LEGAL STANDARD

In determining an ex parte appeal, the Trademark Trial and Appeal Board (TTAB) reviews the final decision of the Examining Attorney in order to ensure that it was correctly made. *See In re: Bose Corp.*, 772 F.2d 866, 227 U.S.P.Q. 1, 4 (Fed. Cir. 1985). Here, the main issue before the TTAB is whether the Examining Attorney was correct in refusing registration of the Mark under Trademark Act Section 2(d) based upon a likelihood of confusion with U.S. Registration No. 3904885. In making this determination, the TTAB must analyze all probative evidence of record bearing on the Examining Attorney's decision.

With respect to determining whether the Examining Attorney was correct in refusing registration due to likelihood of confusion, in an ex parte appeal the USPTO bears the burden of proving likelihood of confusion. *See, e.g., In re Giovanni Food Co.*, 97 U.S.P.Q.2d 1990, 1991 (TTAB 2011) (stating that the USPTO had the burden of proving likelihood of confusion and reversing the refusal to register under Section 2(d) based on the USPTO's failure to meet such burden.).

II. ANALYSIS

a. The Examining Attorney Erred in Finding a Likelihood of Confusion Between Applicant's Mark and U.S. Registration No. 3904885 ("Registration").

Section 2(d) of the Trademark Act is the statutory basis for refusal to register a trademark due to likelihood of confusion, and states, in pertinent part, the following:

No trademark by which the goods of the applicant may be distinguished from the goods of other shall be refused registration on the principal register on account of its nature unless it...(d) Consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be

likely, when used on or in connection with the goods of the application, to cause confusion, or to cause mistake, or to deceive...

15 U.S.C. § 1052(d). In analyzing likelihood of confusion, the TTAB's decision is based on "an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (CCPA 1973) ("*du Pont*"). *In re Giovanni Food Co., Inc.*, 97 U.S.P.Q.2d at *1; *see also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 U.S.P.Q.2d 1201 (Fed. Cir. 2003). While the TTAB must examine all relevant evidence in existence relating to likelihood of confusion, the two key considerations are: (1) the similarities between the marks; and (2) the similarities between the goods and/or services. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 U.S.P.Q.2d 1944 (Fed. Cir. 2004).

The following *du Pont* factors are indicative of and support the fact that the Mark and Registration are not subject to a likelihood of confusion and should be allowed to co-exist in the marketplace: (1) the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression; (2) the similarity or dissimilarity and nature of the goods and services contained in the marks' application or registration; (3) the conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing; (4) the extent of potential confusion, i.e., whether *de minimis* or substantial; and (5) other established facts probative of the effect of use, including, without limitation, sales figures showing the prominent nature of the Mark based upon revenue received from the sale of goods and/or services bearing the Mark.

1) Dissimilarity of the Mark as to Appearance, Sound, Connotation and Commercial Impression With Respect to the Registration

The first *du Pont* factor Applicant relies on is the dissimilarity of the Mark and Registration as to overall connotation and commercial impression. In order to support a finding

of similarity, “[t]he proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Services, Inc. v. Triumph Learning, LLC*, 101 U.S.P.Q.2d 1713, 668 F.3d 1356, 1368 (Fed. Cir. 2012) (internal quotation omitted).

Furthermore, it is well established that marks that are identical in appearance can avoid consumer confusion if they have a different connotation and meaning when applied to their respective goods, and such difference is sufficient to outweigh visual and phonetic similarity. *See e.g., In re Sears, Roebuck and Co.*, 2 U.S.P.Q.2d 1312, 1987 WL 123813 (TTAB 1987) (stating that CROSS-OVER for bras not likely to be confused with CROSSOVER for ladies sportswear, because CROSS-OVER applied to bras suggests the physical construction of the bra, whereas CROSSOVER for ladies sportswear suggests a multi-sport product); *In re Sydel Lingerie Co., Inc.*, 197 U.S.P.Q. 629 (TTAB 1977) (finding no likelihood of confusion between BOTTOMS UP for ladies and children’s underwear and BOTTOMS UP for men’s suits, coats, and trousers, because the marks project different meanings as applied to their respective goods); and *In re British Bulldog, Ltd.*, 224 U.S.P.Q. 854 (TTAB 1984) (finding no likelihood of confusion between PLAYERS’ for men’s underwear and PLAYERS’ for shoes, because PLAYERS when applied to shoes suggests an athletic endeavor, whereas PLAYERS when applied to men’s underwear carries a sexual double-entendre).

Lastly, when one mark consists of a basic word mark and the other consists of a specialized design mark, even if consisting of the same letters, it follows that the marks are to be considered visually dissimilar. In *Application of Burndy Corp.*, the case of likelihood of confusion between two marks was decided primarily on the basis of visual similarity of the

marks. Importantly, while both marks were each based on a capital letter ‘B,’ the court noted “there are great dissimilarities between them which can be fully appreciated from only seeing them.” *Application of Burndy Corp.*, 300 F.2d 938, 940, 133 U.S.P.Q. 196, 197 (CCPA 1962). Based on this understanding, the court stated, “[I]t is the collective judgment of this court that the marks are so distinctively different in appearance that they would not be likely, if in concurrent use, to cause confusion or mistake or to deceive purchasers.” *Id.*; *see also In re Electrolyte Laboratories, Inc.*, 929 F.2d 645, 647, 16 USPQ2d 1239 (Fed. Cir. 1990) (“It must be remembered that registrant’s trademark consists of highly stylized letters and is therefore in the gray region between pure design marks which cannot be vocalized and word marks which are clearly intended to be,” and “that even if the letter portion of a design mark could be vocalized, that was not dispositive of whether there would be likelihood of confusion. A design is viewed, not spoken, and a stylized letter design can not be treated simply as a word mark.”) (citations omitted). The court in *In re Electrolyte* used the aforementioned reasoning to hold that the TTAB erred in finding likelihood of confusion, stating, “Although the symbols and abbreviations can be pronounced, they are not identical, and the design of the marks is substantially different. We conclude that [applicant’s] mark, viewed as a whole, serves to distinguish its goods from those of others.” *In re Electrolyte*, 929 F.2d at 647-48.

Taken into account all of the above, as an initial matter, Applicant’s Mark bears an overall different commercial impression and connotation than that of the Registration. “Connotation” is defined as “the associated or secondary meaning of a word or expression in addition to its explicit or primary meaning³.” As such, the associated or secondary meaning relating to Applicant’s Mark is the “evolution of sports nutrition and supplement products, and all sports, fitness, and/or athletic apparel or endeavors related thereto.” This connotation is

³ See <http://www.dictionary.com/browse/connotation?s=t>

further exemplified by the “EVL” brand created and promoted by Applicant through use of Applicant’s registered trademark for the word mark “EVL” (Registration No. 4423095) for the following goods and services: “Dietary supplements and nutritional supplements, namely, dietary and nutritional supplements in the form of powdered drink mixes, tables, bars, powders, nutritional drinks, and liquid drink mixes.” As Applicant has been using the term “EVL” for its brand since 2013, Applicant has become readily associated with term “EVL” as it relates to goods and services provided in and/or related to the fitness, health, wellness, and athletic apparel industry due to its continuous and worldwide use of the EVL moniker as it relates to the foregoing industry.

On the other hand, it is readily apparent that the Registration does not provide or connote a similar overall commercial impression to that of the Mark. The Registration is used to promote and/or label art created by the registrant. Such art is in the form of graffiti and other forms of various prints. As such, there is no overlap between the commercial impressions of the Mark and Registration, nor can their commercial impressions be deemed similar.

Furthermore, the Examining Attorney failed to note the difference in visual appearance between the Mark and the Registration. The Mark is a standard character mark that consists of standard characters without claim to any particular font style, size, or color. While the Mark consists of standard characters for “EVL,” examples of the Mark being used in commerce are provided below:







On the other hand, the Registration is not a standard character mark, nor does it claim to be so, and is an illustration / drawing consisting of the stylized letters “E,” “V,” and “L.” The Registration is provided below:



Based on the above, it is apparent that the Mark and the Registration are visually dissimilar due to their designs being wholly distinctive of each other. In sum, the Mark and Registration operate in completely different and independent industries, and are sufficiently dissimilar in visual appearance such that they distinguish their respective goods and should be allowed to exist in conjunction with the other due to neither being likely to confuse, mislead, or deceive consumers of the other.

2) Dissimilarity and Nature of the Goods and Services Contained in the Application for the Mark and in the Registration

The second *du Pont* factor Applicant relies on is the dissimilarity and nature of the goods and services described in the Mark's Application as compared to those found in the Registration. In determining whether this factor weighs in favor of finding a likelihood of confusion, the issue "is not whether purchasers would confuse the goods and services, but rather whether there is a likelihood of confusions as to the source of these goods and services." *In Re Balencorp, Inc.*, 2015 WL 6166647, at *3 (TTAB September 28, 2015). Thus, if the goods and/or services being compared in relation to two opposing marks are not related in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that the goods and/or services originate from the same source, then, even if the marks are identical, confusion is not likely. *See Local Trademarks, Inc. v. Handy Boys Inc.*, 16 U.S.P.Q.2d 1668 (TTAB 1986); TMEP § 1207.01(a)(1); *see also In re Team Financial*, 2001 WL 831219, at *2 (TTAB July 23, 2001) (reversing a refusal to register a trademark, because "absent a showing that the relevant purchasing public would expect that both [applicant's goods] and [registrant's goods] would emanate from a common source, we cannot find that there exists a likelihood of confusion.") (emphasis in the original). Such is exactly the case here.

Despite the fact both the Mark and the Registration seek to serve as trademarks with regard to various goods and services associated with International Class 25, the fact of the matter is, by virtue of the Mark solely operating in the fitness, wellness, sports, and athletics industry, and the Registration solely operating in the arts and crafts industry, because there is no overlap in industry, connotation, or commercial impression, and because the Mark and Registration are visually dissimilar, it follows that there is no instance in which purchasers would confuse the sources of the goods and services offered by the Mark and the Registration, respectively. Stated differently, due to the visual dissimilarity of the Mark and Registration, and due to the fact the Mark relates to fitness and the like and the Registration relates to arts, no purchaser would think that both Applicant's goods and services and the Registration's goods and services would emanate from a common source.

3) The Conditions Under Which and Buyers to Whom Sales Are Made

The third *du Pont* factor Applicant relies upon is the condition under which and to whom sales are made. "When consumers exercise heightened care in evaluating the relevant products before making purchasing decisions, courts have found there is not a strong likelihood of confusion. Where the relevant products are expensive, or the buyer class consists of sophisticated or professional purchasers, courts have generally not found Lanham Act violations." *Checkpoint Systems, Inc. v. Check Point Software Technologies, Inc.*, 269 F.3d 270, 284, 60 U.S.P.Q.2d 1609 (3rd Cir. 2001). In *Dynamics Research Corp. v. Langenau Mfg. Co.*, the Federal Circuit stated that because the opposing marks were used on goods that are, *inter alia*, "sold to different, discriminating customers, there is no likelihood of confusion" even though both parties used identical marks. 704 F.2d 1575, 1576, 217 U.S.P.Q. 649 (Fed. Cir. 1983) (emphasis in the original) (internal quotations omitted); *see also Perini Corp. v. Perini Constr., Inc.*, 915 F.2d

121, 128 (4th Cir. 1990) (“In a market with extremely sophisticated buyers, the likelihood of consumer confusion cannot be presumed on the basis of similarity in trade name alone.”).

In the similar vein in which there exists no instance in which consumers would believe the Mark’s goods and services and the Registrations goods and services to emanate from the same source, it also follows that there is no instance in which both Applicant’s and the registrant’s goods would be encountered by the same prospective consumers. As mentioned above, the Mark is part of goods and services related to the fitness industry and supplied under the “EVL” brand created by Applicant. As such, Applicant markets its goods and services to athletes, fitness enthusiasts, and those looking for wellness supplements or extra help losing weight. On the other hand, the Registration serves as a source identifier for art and graffiti created by the registrant.

A quick examination of the store located on the website associated with the Registration – <https://www.evlworld.com/shop/> – shows that consumers may filter the price range from as low as \$12.00 to as high as \$16,000.00. Accordingly, it follows that consumers of the Registration’s goods and services are: (1) those looking to acquire art specialized by and/or unique to the Registration, and (2) are of the sophisticated variety due to the expensive nature and ability to choose from various prices with regard to the goods offered. Coupled with the fact consumers of the Mark’s goods and services are: (1) those looking to acquire fitness or nutritional supplements in order to gain an edge or assist with training or dieting, and (2) are of the sophisticated variety due to the plethora of fitness and nutritional supplements available on the market, which requires such consumers to exercise substantial care in making sure that the product purchased fits their specific and dietary needs, it follows that this factor lends to a finding of no likelihood of confusion between the Mark and the Registration. *See Mecanique de*

Precision v. Polaroid Corp., 657 F.2d 482, 489 (1st Cir. 1981) (citation omitted) (“Courts have found less likelihood of confusion where goods are expensive and purchased after careful consideration.”).

Furthermore, no good or service offered under the Mark carries a price tag equal to the goods and services offered under the Registration, as athletic apparel sold under the Mark ranges only from \$20.00 to \$30.00. *See Speedry Products, Inc. v. Dri Mark Products, Inc.*, 271 F.2d 646, 651, 123 USPQ 368, 372 (2d Cir. 1959) (finding wide price differential to be a significant factor against likelihood of confusion).

Lastly, as seen by the examples provided above detailing the Mark’s use in commerce, the Mark is visibly apparent on all products, thus readily informing consumers when they have come across a good or service promoted by Applicant. Due to the fact the “EVL” brand has become readily associated with Applicant through Applicant’s continuous and extensive use of the “EVL” moniker in relation thereto, and because there are a litany of other products similar to Applicant’s that are visibly branded by their respective marks⁴ – all of which are commonly known by fitness enthusiasts – thereby requiring consumers to exercise great care in making purchases, it follows that consumers of the Mark, similarly to those of the Registration, are sophisticated purchasers. *See L.A. Gear Inc. v. Tom McAn Shoe Co.*, 988 F.2d 1117, 1134 (Fed. Cir. 1993) (stating the district court erred in determining purchasers of shoes were unsophisticated and casual in their purchases and stating, “We agree with Appellants that purchasers of fashion athletic shoes are likely to be well are of the source of such shoes, when such sources are conspicuously marked on the shoes by both copier and originator.”)

4) The Extent of Potential Confusion

⁴ For examples, *see, e.g.*, <https://www.cellucor.com/apparel>, <https://teamgat.com/store#!/GAT-Gear/c/11558015>, <https://shredz.com/shop#accessories+bottoms+looks+stringers+t-shirts+tanktops+tops>, and <https://www.bmfitgear.com/collections/bmfit-apparel>

The next *du Pont* factor Applicant relies upon is the extent of potential confusion between the Mark and the Registration. Based upon the reasoning outlined in the sections above, and in Section 5, *infra*, it follows that any extent of potential confusion between the Mark and Registration is *de minimis*.

In *In re Flatiron Partners, LLC*, the court stated that because “We have found that virtually all of Applicant’s potential customers are also potential customers for lending services, and we must assume that at least some of Registrant’s potential customers are potential customers for Applicant’s hedge fund services,” due to the potential overlap, reputational confusion between the parties would be commercially substantial. 2014 WL 5788048, at *11 (TTAB Oct. 22, 2014). The reasoning used to find that the extent of potential confusion was substantial was based upon the fact consumers of one mark may also be consumers of others, and therefore be potentially confused as to the source of such goods and services. However, as aforementioned in each section above, the Mark and Registration are: (1) dissimilar in appearance; (2) both subject to purchase by sophisticated purchasers upon careful consideration; (3) operate in entirely independent and mutually exclusive industries; and (4) are not likely to be encountered by the same subset of consumers. As a result, there can be no overlap in the minds of consumers that would lead to substantial commercial confusion with regard to goods and services bearing the Mark and those offered via the Registration. In any event, such overlap would be *de minimis*, which weighs in favor of registration of the Mark.

5) Other Established Facts Probative of the Effect of Use

In addition to the foregoing, Applicant attaches hereto as Exhibit “A” the following: (1) Applicant’s sales / revenue for goods and services bearing the Mark and sold under the “EVL” brand for the year 2014; (2) Applicant’s sales / revenue for goods and services bearing the Mark

and sold under the “EVL” brand for the year 2015; and (3) Applicant’s sales / revenue for goods and services bearing the Mark and sold under the “EVL” brand for the year 2016 up to the beginning of August. Pursuant thereto, while the attachments show all sales made by Applicant under the “EVL” brand, it specifically shows that for the goods and services listed in the Application for the Mark: (1) for the year 2014, Applicant’s sales / revenue totaled \$64,004.22; (2) for the year 2015, Applicant’s sales / revenue totaled \$225,970.22; and (3) for the year 2016 up to the beginning of August, Applicant’s sales / revenue totaled \$93,693.26. A more comprehensive review of Exhibit A shows that for all goods and services sold by Applicant under the “EVL” brand, Applicant’s total sales / revenue easily eclipse multimillions of dollars, and Applicant has expended millions of dollars in promoting and advertising its “EVL” brand. This evidence, coupled with the fact there have been no known or alleged instances of actual confusion between Applicant’s Mark and the Registration further show that both marks are capable of, and should be allowed to, co-exist as respective trademarks, and that no likelihood of confusion exists between them.

CONCLUSION

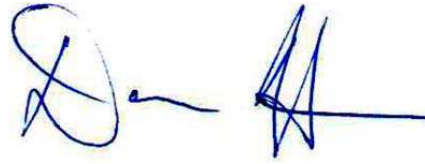
For all of the foregoing reasons, Applicant respectfully submits that the Examining Attorney failed to meet her burden in refusing registration of Applicant’s Mark, and requests that the TTAB grant this Ex Parte Appeal and allow the registration of Applicant’s Mark, EVL, on the Principal Register.

September 15, 2016

Respectfully submitted,

Heitner Legal, P.L.L.C.
Attorney for Applicant
1736 NE 7th Street
Fort Lauderdale, Florida 33304

Telephone: (954) 558-6999

A handwritten signature in blue ink, consisting of a stylized 'D' followed by a horizontal line and a large 'H'.

By:

Darren Heitner, Esq.
Florida Bar No.: 85956
darren@heitnerlegal.com

EXHIBIT A

EVOLUTION NUTRITION

Sales by Product/Service Summary

January - December 2014

Products	
	Amount
A-10 Blue Raz 5sv Trial	\$2,270.00
A-10 Ras Lem 5sv Trial	\$2,270.00
BCAA Energy Blue Raz 40 Srv	\$34,729.20
BCAA Energy Blue Raz 5 Sv.	\$4,540.00
BCAA Energy Fruit Punch 40 Srv	\$36,185.02
BCAA Energy Fruit Punch 5 Sv.	\$5,221.00
BCAA Energy Orange Dr 40 Srv	\$23,573.76
BCAA Energy Orange Dream 5 Sv	\$4,540.00
Bodybuilding/EVL Beanies	\$5,880.00
Canada ENGN 30 Sv. Blue Raz	\$19,645.92
Canada ENGN 30 Sv. Fruit Punch	\$9,822.96
Canada ENGN 30 Sv. Waterm	\$3,742.08
Canada ENGN 8 Sv. Blue Raz	\$2,399.04
Canada ENGN 8 Sv. Fruit Punch	\$2,741.76
Canada ENGN 8 Sv. Watermeln	\$2,056.32
CLA 90 Count	\$65,180.16
ENGN 8 SV Blue Razz	\$48,323.52
ENGN 8 SV Fruit Punch	\$37,338.00
ENGN 8 SV Watermelon	\$31,872.96
ENGN Variety Box	\$73,548.00
EU ENGN 30 Serv. Blue Raz	\$7,951.92
EU ENGN 30 Serv. Fruit Punch	\$2,806.56
EU ENGN 30 Serv. Orange Dream	\$2,806.56
EU ENGN 30 Serv. Watermelon	\$2,806.56
EU ENGN 8 SERV Fruit Punch	\$2,056.32
EU ENGN 8 SERV Orange Dream	\$1,542.24
EVL/BB.com Shaker Bottles	\$13,843.20
EVLNOA1030SVBLUEPW	\$21,241.92
EVLNOA1030SVORANGE	\$15,356.64
EVLNOA1030SVRLEMPW	\$28,082.15
EVLNCRE060SVBLUEPW	\$9,609.81
EVLNCRE060SVUNFLPW	\$29,131.56
EVLNENG30SVBLUEPW	\$396,407.11
EVLNENG30SVFURIOUSGRAPE	\$86,477.13
EVLNENG30SVGREENAPPLE	\$168,393.60
EVLNENG30SVORANGE	\$134,013.24

EVLNENGN30SVPUNCPW	\$185,466.84
EVLNENGN30SVWATEPW	\$163,014.36
EVLNGLU045SVBLUEPW	\$18,366.12
EVLNGLU045SVUNFLPW	\$10,650.60
EVLNREBL30SVBLUEPW	\$19,275.61
EVLNREBL30SVWATEPW	\$21,516.96
LEANMODE 150 CAPS (50 SERV)	\$68,616.48
LeanMode 30 Capsules (10 srvg	\$7,632.24
TOTAL	\$1,832,945.43

Clothing

	Amount
Men's EVL Crew Large	\$1,693.87
Men's EVL Crew Medium	\$1,169.22
Men's EVL Crew Small	\$1,004.33
Men's EVL Crew XL	\$884.41
Men's EVL Crew XXL	\$599.60
Men's Gray Tank Top L	\$758.45
Men's Gray Tank Top M	\$744.66
Men's Gray Tank Top S	\$758.45
Men's Gray Tank Top XL	\$675.71
Men's Gray Tank Top XXL	\$675.71
Men's Tank Top L	\$1,942.38
Men's Tank Top M	\$1,574.69
Men's Tank Top S	\$527.56
Men's Tank Top XL	\$803.33
Men's Tank Top XXL	\$515.57
Men's White EVL T-Shirt Large	\$55.16
Men's White EVL T-Shirt Medium	\$55.16
Men's White EVL T-Shirt Small	\$110.32
Men's White EVL T-Shirt XL	\$55.16
Men's White EVL T-Shirt XXL	\$55.16
Men's White Tank Top L	\$675.71
Men's White Tank Top M	\$565.39
Men's White Tank Top S	\$510.23
Men's White Tank Top XL	\$510.23
Men's White Tank Top XXL	\$510.23
Trans4orm 5sv	\$2,951.00
Trans4orm Burner 60sv	\$39,296.88
Women's Tank Top L	\$443.63
Women's Tank Top M	\$791.34
Women's Tank Top S	\$935.22

Women's Tank Top XS	\$611.49
EVL Black/Black hat	\$734.51
EVL Black/Blue hat	<u>\$809.46</u>
TOTAL	\$64,004.22

Incline Health, Inc.
Sales by Customer Summary
January through December 2015

	Accessories	Auxiliary Product	Clothing	Fat Burners	Pre-workout	Trials	Unclassified	TOTAL
▼ BodyBuilding.com								
Florida ▶	17,024.64 ◀	659,007.96	34,331.30	343,586.62	687,658.60	66,988.88	-368,280.92	1,440,317.08
Idaho	15,505.06	412,251.32	28,162.58	203,936.58	459,417.81	44,474.20	-385,814.48	777,933.07
Nevada	67,783.45	987,451.10	42,686.18	510,932.72	1,018,411.78	92,157.20	-787,933.42	1,931,489.01
Pennsylvania	43,347.86	1,330,865.04	58,820.90	661,295.34	1,524,529.44	165,295.06	-725,895.81	3,058,357.83
Pennsylvania Offsite	1,260.00	5,545.92	7,092.14	29,104.08	89,349.36	1,261.50	-20,130.94	113,482.06
Wisconsin	31,714.56	1,062,866.80	44,855.50	549,998.28	1,167,457.40	124,604.50	-678,717.68	2,302,779.36
BodyBuilding.com - O...	1,754.79	34,602.27	9,921.62	-75,057.79	-1,547,623.47	-164,449.34	287,425.39	-1,453,426.53
Total BodyBuilding.com	178,390.36	4,492,590.41	225,970.22	2,223,795.83	3,399,200.92	330,332.00	-2,679,347.86	8,170,931.88
TOTAL	<u>178,390.36</u>	<u>4,492,590.41</u>	<u>225,970.22</u>	<u>2,223,795.83</u>	<u>3,399,200.92</u>	<u>330,332.00</u>	<u>-2,679,347.86</u>	<u>8,170,931.88</u>

EVL Nutrition
Sales by Customer Summary
January through December 2016

	clothing	Products	Promotion	Protein	Trials	Unclassified	TOTAL
▼ BodyBuilding.com							
Florida	4,042.51	1,153,733.83	-361,289.47	177,800.44	87,412.01	-60,366.24	1,001,333.08
Nevada	26,585.58	3,422,334.44	-1,042,190.18	444,551.80	198,074.65	56,873.00	3,106,229.29
Pennsylvania	33,255.70	4,155,236.21	-1,634,804.52	565,010.45	200,813.47	48,339.75	3,367,851.06
Pennsylvania Offsite	230.22	312,502.82	-106,035.52	0.00	817.20	-935.04	206,579.68
Wisconsin	24,864.61	3,065,964.39	-1,284,268.74	413,637.28	151,027.56	31,693.62	2,402,918.72
BodyBuilding.com - O...	4,714.64	12,009.12	-5,957.81	17,426.40	0.00 ▶	16,954.85 ◀	45,147.20
Total BodyBuilding.com	93,693.26	12,121,780.81	-4,434,546.24	1,618,426.37	638,144.89	92,559.94	10,130,059.03
TOTAL	<u>93,693.26</u>	<u>12,121,780.81</u>	<u>-4,434,546.24</u>	<u>1,618,426.37</u>	<u>638,144.89</u>	<u>92,559.94</u>	<u>10,130,059.03</u>